82-1039

Supreme Court, U.S.
FILED
Dec 20 1982
ALEXANDER L. STEVAS
CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BETTY JEAN LUX DUNN, PETITIONER

VS.

STATE OF TEXAS, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS
FOR THE FIRST SUPREME JUDICIAL DISTRICT
OF THE STATE OF TEXAS

Louis Dugas, Jr.
1804 N. 16th St.
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713-883-3506

ATTORNEY FOR
PETITIONER

QUESTIONS PRESENTED

Can a State consistent with the Double Jeopardy Clause prosecute as two separate crimes a single transaction involving different drugs?

Whether the doctrine of collateral estoppel is applicable to a second prosecution based upon the simultaneous possession of two different drugs?

Does the Double Jeopardy Clause require that a plea of former acquittal be based on a legally sufficient indictment?

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

OCTOBER TERM, 1982

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BETTY JEAN LUX DUNN, PETITIONER

VS.

STATE OF TEXAS, RESPONDENT

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COURT OF APPEALS
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ATTORNEY FOR
PETITIONER

OPINION BELOW

The opinion in the case of Betty Jean Lux Dunn was ordered not published. (App. A, infra (1a-13a). The Court of Criminal Appeals refused the petition for discretionary review. (App. B 14a). The motion for rehearing was also denied. (App. C 15a).

JURISDICTION

In the case of Betty Jean Lux Dunn, the Court of Appeals opinion (App. A infra 1a-13a) was rendered June 3, 1982. A petition for discretionary review was denied on September 15, 1982. A motion for rehearing was denied on October 20, 1982.

The petition for certiorari was filed within sixty (60) days of the date the motion for rehearing in the case of Betty Jean Lux Dunn.

This Court's jurisdiction is invoked under 28 USC §1957 (3).

CONSTITUTIONAL PROVISION INVOLVED

USC Constitution, Amendment 5 (Double Jeopardy Clause)

> . . .; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

STATEMENT OF THE CASE

This petition for certiorari involve

the cases of a husband and wife tried for the same offense at separate trials.

On the 27th day of January, 1979 the home of Ronald Dale Dunn and Betty Jean Lux Dunn was searched pursuant to a search warrant authorizing a search for drugs. The execution of the search warrant uncovered amphetamine and marihuana. Both Dunns were indicted by the Grand Jury of Brazoria County. There were two indictments returned against each Dunn. One indictment charged them with four counts involving amphetimine. The second indictment charged them with the offense of possession of marihuana.

On April 14, 1980, the petitioners were placed on trial for the charges involving amphetamines. Upon completion of State's case in chief, both petitioners moved for an instructed verdict of acquittal because the State had charged them with manufacturing and possessing "amphetimine" and the proof offered by the State established the control substance to be "amphetamine." The Court granted the motions for instructed verdicts of not guilty. (App. A 2a-3a).

Subsequently the petitioners were each brought to trial on the indictments alleging possession of marihuana. Each petitioner filed a timely plea in bar alleging that the offenses were one and the same and that the judgment acquitting them of the amphetamine charges was a bar to further prosecution. The plea in bar was denied by the trial judge and each petitioner proceeded to trial. Betty Jean Lux Dunn was convicted of possession of marihuana and given 10

years probated and a fine of $2,500.00. Ronald Dale Dunn was also convicted of possession of marihuana and given 10 years probated over 8 and fined $5,000.00.

Both convictions were upheld by the Texas Court of Appeals and both petitioners were denied review by the Texas Court of Criminal Appeals.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The petitioner has been deprived of her underlying basis to lodge a claim of former acquittal under the Double Jeopardy Clause of the 5th Amendment to the United States Constitution. This has occured as a result of the appellate courts in Texas considering these cases as involving the Texas doctrine of carving which has been abolished. Ex Parte McWilliams, Tex. Cr. App., 634 S. W. 2d 815 (1982). Each of the Texas Courts of Appeals considering the appeals filed by each petitioner refused to acknowledge that Article 27.05 Texas Code of Criminal Procedure controls the proper disposition of these cases. This article specifically allows each defendant in a criminal case, where situation allows, to file a plea alleging that

> "he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial and that the former prosecution: (1) resulted in acquittal; . . ."

If the Court of Appeals had properly considered Art. 27.05 C.C.P. then the please in bar filed by each of the petitioners would have barred the second prosecution on the charge of marihuana. The courts of Texas have created by innuendo two offenses in a situation such as this where the offense involves the simultaneous possession of two different drugs. In fact the courts of Texas had held on

numerous occasions that the simultaneous possession of two drugs was but one offense. Ex Parte Adams, Tex. Cr. App. 541 S W 2440 (1976). There have been no further cases in Texas overruling these cases, yet the action of the Court of Appeals effectively deprives this defendant of her right to claim Double Jeopardy.

B, The cases involving petitioner are dealing with the question of former acquittal and whether successive prosecutions are permissible. As the Supreme Court of the United States said in Brown v. Ohio, 432 US 161, 53 L. Ed. 187, 97 S. Ct. 2221 (1977).

> "The Blockburger test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first."

Ashe v. Swenson 397 US 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 (1970). In fact the analogy between the Ashe case this case is strikingly similar. In Ashe separate convictions of the robbery of each victim would have required proof in each case that a different individual had been robbed. In the instant case, separate convictions for

possessing drugs would have required proof that a different drug had been possessed. Therefore the doctrine of collateral estoppel incorporated into the Double Jeopardy Clause is applicable to this case.

C. The Double Jeopardy Clause does not require a legally sufficient indictment as a bar to a second prosecution. In Ball v. United States 163 US 662, 41 L. Ed. 300, 16 S. Ct. 1192 (1896), the Court held that if the Court had jurisdiction of the cause and the party, a verdict of acquittal was conclusive in favor of the defendant Millard Ball even though the indictment was insufficient. The Texas case of Mixon v. State, 35 Tex. Crim. 458, 34 SW 290 (1896) hold that

> "no matter how defective the indictment was, the State could not again put him on trial for said offense of which he had been previously acquitted."

The Supreme Court having stated in Sanabria v US 437 US 45,

> "It is without constitutional significance that the Court entered a judgment of acquittal rather that directing the jury to bring in a verdict of acquittal . . ."

In this cause the indictment alleged the drug as being "amphetimine" and the proof showed amphetamine. Amphetimine is not a controlled substance. At the close of the

State's case the defendant moved for an instructed verdict of acquittal which was granted by the court. Petitioner submits that she has been forced to run the tauntlet twice and that her plea of former acquittal should have been granted.

CONCLUSION

For these reasons, a writ of certiorari whould be issued to review the judgment and opinon of the Texas Courts of Appeal.

Respectfully submitted,

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APPENDIX A

BETTY JEAN LUX DUNN, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

NO. 01-81-0768-CR

212TH DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

TRIAL COURT CAUSE NUMBER 36,634

Appeal from the 212th District Court of Galveston County, Texas.

This is an appeal from a conviction for possession of marihuana.

On January 27, 1979, the police searched the home of Ronald Dale Dunn and Betty Jean Lux Dunn, husband and wife, located in Lake Jackson, Texas, pursuant to a warrant authorizing a search for drugs.

Upon their search of the Dunn's house, the police found a white, vinyl plastic bag containing a large amount of marihuana which was lying among some frozen meat in a freezer in the garage. After the police searched the garage, the appellant's husband directed the officers into a separate room adjacent to the master bedroom. During the search, the appellant referred to this room as "the dope room." There, police found marihuana rolled up in a newspaper in the closet, stalks of marihuana, and other related articles behind a gun

cabinet. Lying upon a table in the room were some stalks of marihuana and a couple of bags of marihuana. The police found a suitcase in the closet of the bedroom which contained a large amount of marihuana and a smoking pipe.

A chemist for the Texas Department of Public Safety, who had weighed and analyzed the contraband, testified that marihuana weighing over four ounces was contained within the materials seized during the search.

On May, 1979, the Grand Jury for Brazoria County returning two indictments against the appellant. One indictment, numbered 11,926, charged the appellant in four different paragraphs with offenses specifically involving the substance amphetimine (amphetamine). The second indictment, numbered 11,927, charged the appellant with the offense of possessing a usable quantity of marihuana of an amount more than four ounces.

On April 14, 1980, the appellant was placed on trial for the charges in paragraphs one and four of Indictment No. 11, 926. Upon completion of the State's case in chief, the defendant moved for an instructed verdict of acquittal, alleging that the State had failed to meet its burden because the indictment alleged that the defendant had manufactured and had possessed the controlled substance, "amphetimine"! whereas, the evidence offered by the State established the controlled substance to be "amphetamine." The Court granted the defendants' motion for in-

structed verdict of not guilty.

In this cause, 11,927, the appellant filed a Special Plea in Bar alleging that the State should not prosecute the case because "on the 19th day of May, 1979, in the 23rd District Court for Brazoria County, Texas, there was duly and legally presented and filed in said last named court a valid indictment" (Indictment No. 11,926) charging the appellant with the manufacture, possession, and intent to deliver "amphetimine," a controlled substance (Indictment No. 11,926). The appellant maintained in her plea that the offenses in Indictments No. 11,926 and in No. 11,927 were part of one and the same transaction and that the judgment acquitting her of the charges in Indictment No. 11,926 was a bar to further prosecution under the charges in Indictment No. 11, 927.

The case was transferred to Galveston County on a change of venue.

The trial court denied the plea, and the case proceeded to trial; whereupon the jury found the appellant guilty of the possession of a usable quantity of marihuana and placed her punishment at ten years imprisonment and a fine of $2,500.00. Upon the jury's recommendation, the court probated the appellant's sentence.

The appellant argues in her first ground of error that the trial court committed reversible error in overruling the appellant's special plea in bar.

The appellant asserts that the offense

of possession of manufacture of amphetimines" and the offense of possession of a usable amount of marihuana are offenses arising out of the same transaction and that her acquittal by instructed verdict in the first trial barred the subsequent prosecution for possession of marihuana under the Constitutional Prohibition against Double Jeopardy. The appellant cites Tex. Code Crim. Pro. Ann. art. 27.05 (Vernon Supp. 1982), which reads:

> Art. 27.05 Defendant's Special Plea
>
> A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:
>
> 1. resulted in acquittal;
> 2. resulted in conviction;
> 3. was improperly terminated; or
> 4. was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

According to the appellant, she has already been prosecuted for the manufacture

and possession of amphetamines which were offenses "arising out of the same criminal episode" as the offense of possession of marihuana. Thus, she argues that having been acquitted of all charges by instructed verdict, and the trial court's judgment on such charges being final, the State waived its right to prosecute her for possession of marihuana by reason of its earlier prosecution of her for manufacture and possession of "amphetimines."

In Jones v. State, 482, S. W. 2d 194 (Tex. Crim. App. 1972), two indictments were returned against the appellant, one for the possession of heroin and one for the possession of marihuana. The police had found the marihuana and the heroin in the appellant's possession pursuant to one search. The cases were tried together before the same jury, and the appellant was convicted of both offenses. In reversing one of the convictions the Court said:

> The prosecuting attorney many carve as large an offense out of a single transaction as he can, but he must cut only once. (Citation omitted).
>
> Under the fact situation of the present case, we hold that the possession of the heroin and the possession of marihuana constitute the same offense and only one conviction may stand.

The appellant also cites Ex Parte Adams, 541 S.W. 2d 440 (Tex. Crim. App. 1976), and Cheeseman v. State, 520 S.W. 2d 382 (Tex.

Crim. App. 1975), which stand for the same prohibition against "carving."

"Amphetimine" is not a controlled substance under the Controlled Substances Act, Tex. Rev. Civ. Stat. Ann. art. 4476-15 (Vernon 1976 & Supp. 1982). Undoubtedly, the Indictment in cause no. 11,926 contains a misspelling of the drug "amphetamine" (methamphetamine) which is the drug that was actually found in the appellant's house and which is a controlled substance under Article 4476-15. It is a felony offense to illegally possess or manufacture "amphetamine" or its salts, isomers, or salts of isomers. Tex. Rev. Civ. Stat. Ann. art. 4476-15 § § 4.02 (b), 4.09 (Vernon Supp. 1982).

Since possession or manufacture of "amphetimine" is not a crime in Texas, Indictment No. 11,926 was fatally defective. Lucero v. State, 502 S.W.2d 128 (Tex. Crim. App. 1973); Spicer v. State, 78 Tex. Crim. 57, 179 S.W. 712 (1915).

Tex. Code Crim. Pro. Ann. arts. 1.10 & 1.11 (Vernon 1977) read:

> Art. 1.10 Jeopardy
>
> No person for the same offense shall be twice put in jeopardy for life or liberty; nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction.

The appellant argues that because the

trial court entered an order and judgment of acquittal, such judgment is a bar to further prosecution.

The Court of Criminal Appeals has dealt squarely with this issue in Thompson v. State, 527 S.W. 2d 888 (Tex. Crim. App. 1975). In that case the first indictment against the appellant alleged that the offense had been committed on December 31, 1971, an impossible date. Before the introduction of any evidence, the trial court instructed the jury to acquit the appellant. The appellant was reindicted for the same offense alleged to have been committed on the proper date of December 31, 1970. A pre-trial hearing was held concerning the appellant's plea of former acquittal, and the trial court overruled the plea. In determining, on appeal, whether the trial court improperly overruled the plea, the Court of Criminal Appeals noted that because the first indictment alleged an impossible date, the jurisdiction of the court had not been properly invoked. Also, since no conviction was possible under this indictment, "the court could have and should have treated this as a motion to quash and should have dismissed rather than instructed a verdict of acquittal." In a discussion of the law, the Court stated the general rule that where the jurisdiction of the court is properly invoked, an actual trial on the merits takes place, and a jury reaches a verdict, an acquittal of the offense is a bar to any subsequent prosecution for the same offense. Mixon v. State, 35 Tex. Crim. 458 34 S.W. 290 (1896). However, the court also noted the rule that:

> 'an acquittal on an indictment so defective that,... it would not have supported a conviction or sentence ...(is) ... insufficient to support a plea of former acquittal.' 22 C.J.S. Criminal Law, Sec. 172; 16 Tex. Jur. 2d Criminal Law, Sec. 121.

Thus the Court held that although the trial court's instruction to the jury to acquit the appellant, rather than dismissing the case, was not determinative of the plea, that because the indictment against the appellant was fatally defective, the transaction to acquit did not bar the prosecution on a new, valid indictment. See also Smotherman v. State, 415 S.W. 2d 430 (Tex. Crim. App. 1967); Reynolds v. State, 58 Tex. Crim. 273, 124 S.W. 931 (1910).

The holding in Thompson v. State is dispositive of the appellant's arguments in ground of error one. Because the Indictment in cause no. 11,926 was fatally defective, the trial court's instructed verdict of acquittal in that case was not a valid judgment, and the "carving doctrine," upon which the appellant relies is not applicable to the case at bar.

The appellant's first ground of error is overruled.

The appellant argues in her third ground of error that the trial court committed reversible error in refusing to submit the appellant's requested charge to the jury.

The appellant contends that it was her

mandatory right to have a charge submitted to the jury concerning her plea in bar. The language in Tex. Code Crim. Pro. Ann. arts. 27.07 and 28.12 (Vernon 1966), to support her contention:

> Art. 27.07 Special Plea Tried
>
> All issues of fact presented by a special plea shall be tried by the trier of the facts on the facts on the trial on the merits.
>
> Art. 28.12 Exception and Trial of Special Pleas
>
> When a special plea is filed by the defendant, the State may except to it for substantial defects. If the exception by sustained, the plea may be amended. If the plea be not excepted to, it shall be considered that issue has been taken upon the same. Such special pleas as set forth matter of fact proper to be tried with a plea of not guilty.

The appellant claims that because the State did not except to the plea, the issues contained therein should have been submitted to the jury.

A review of the record reveals that at the close of the State's case in chief, the appellant tendered, without objection from the State, the plea in bar previously filed with and objected to by the State. During a discussion, out of the presence of the jury, concerning proposed instructions to the jury, the prosecutor indicated that he wished to except to the

appellant's requested instructions relating to the plea in bar. The court then denied the appellant's requested charge.

Contrary to the appellant's argument, the trial court may overrule a defendant's special plea and decline to submit it to the jury, if, conceding the facts to be true, the plea is not legally valid. Arredondo v. State, 582 S. W. 2d 457 (Tex. Crim. App. 1979); Thompson v. State, 99 Tex. Crim. 470, 269 S. W. 1048 (1925). "An issue of fact arising upon a motion to set aside an indictment or information shall be tried by the judge without a jury." See also Tex. Code Crim. Pro. Ann. art. 27.04 (Vernon 1966).

The appellant's plea in bar was legally defective on its face because it alleged and invalid indictment which could not have supported the appellant's acquittal. Therefore, there was no sound legal basis upon which the court could have submitted fact issues concerning the appellant's plea to the jury, and the trial court was correct in overruling the appellant's plea.

Ground of error three is overruled.

In ground of error two the appellant asserts that there was not sufficient evidence presented at trial to prove that the appellant was "in possession" of a usuable amount of marihuana, and that, as a result, the trial court erred in denying the appellant's motion for an instructed verdict of not guilty.

When an accused is charged with the unlawful possession of a narcotic or danger-

ous drug, two elements must be proven: (1) that he exercised care, control and management over the contraband, and (2) that he knew the object he possessed was contraband. Powell v. State, 502 S.W.2d 705 (Tex. Crim. App. 1973); Hernandez v. State, 538 S.W.2d 127 (Tex. Crim. App. 1976). Possession need not be exclusive, and evidence showing that the accused jointly possessed the contraband with another is sufficient. A finding of joint possession, however, cannot be justified solely on the basis of proof of mere presence at a place where contraband is being used or possessed. The evidence must affirmatively link the accused to the drug he is alleged to have possessed. Hernandez v. State, supra; Powell v. State, supra; Payne v. State, 480 S.W.2d 732 (Tex. Crim. App. 1972). An affirmative link may be established by the showing of additional facts and circumstances which indicate the accused's knowledge of the narcotic as well as his control over such. Mendoza v. State, 583 S.W.2d 396 (Tex. Crim. App. 1979); Martinez v. State, 539 S.W.2d 885 (Tex. Crim. App. 1976); Powell v. State, supra; Hineline v. State, 502 S.W.2d 703 (Tex. Crim. App. 1973); Alba v. State, 492 S.W.2d 555 (Tex. Crim. App. 1973).

There was sufficient evidence presented at trial to affirmatively link the appellant to the marihuana she was alleged to have possessed, in such a manner, and to such an extent, that the jury could reasonably infer that the appellant knew of the drugs in her home and that she exercised care, control and management over them.

It was established that the house in which the drugs were seized was the ap-

pellant's home which she occupied as her residence along with her husband and her two children. The odor of amphetamines and of marihuana permeated the entire house and the garage. Drugs were hidden throughout the house and garage, including the master bedroom where the appellant slept and in the freezer where the family kept its food. Drugs were found in the closet where the appellant kept her clothes. The appellant, herself, referred to a room in which a great deal of marihuana and amphetamines had been stored, as "the dope room."

There was little direct evidence presented by the State, but a great deal of circumstantial evidence was presented which was sufficient to establish the appellant's guilt.

Ground of error two is overruled.

The judgment of the trial court is affirmed.

/s/ Sam Bass
Associate Justice

Chief Justice Evans and Associate Justice Warren also sitting.

No Publication. Tex. Crim. App. R. 207

Judgment rendered and Opinion filed June 3, 1982.

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

CAUSE NO. 0605-82

BETTY JEAN LUX DUNN, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

NO. 01-81-0768-CR

212TH DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

TRIAL COURT CAUSE NUMBER 36,634

Appeal from the 212th District Court of Galveston County, Texas.

I have been instructed to advise that the Court has this day refused the Appellant's petition for discretionary review in Cause No. 0605-82, DUNN, BETTY JEAN LUX.

Sincerely yours,

Thomas Lowe, Clerk

Dated: September 15, 1982
Austin, Texas

APPENDIX C

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

CAUSE NO. 0605-82

BETTY JEAN LUX DUNN, APPELLANT

VS.

THE STATE OF TEXAS, APPELLEE

NO. 01-81-0768-CR

212TH DISTRICT COURT OF
GALVESTON COUNTY, TEXAS

TRIAL COURT CAUSE NUMBER 36,634

Appeal from the 212th District Court of Galveston County, Texas.

I have been instructed to advise that the Court has this day denied the Motion for Rehearing on Appellant's petition for discretionary review in Cause No. 0605-82, DUNN, BETTY JEAN LUX.

Sincerely yours,

Thomas Lowe, Clerk

Dated: October 20, 1982
Austin, Texas

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO._____

BETTY JEAN LUX DUNN, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

CERTIFICATE OF SERVICE

Louis Dugas, Jr., hereby certifies that he is a member of the bar of the Supreme Court of the United States and counsel for Betty Jean Lux Dunn, Petitioner in the above matter; and that a true and correct copy of the above and foregoing Brief in Opposition has been mailed to the attorneys for the Respondent, the Honorable Jim Maples, District Attorney, Brazoria County Courthouse, Angleton, Texas, 77515, by mail, postage prepaid, on this the 31st day of December, 1982.

Louis Dugas, Jr.

Office - Supreme Court, U.S.
FILED
MAR 18 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

NO. 82-1194

RONALD DALE DUNN,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

NO. 82-1039

BETTY JEAN LUX DUNN,
Petitioner

V.

THE STATE OF TEXAS,
Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER, UNDER THE DOUBLE JEOPARDY CLAUSE, A DIRECTED VERDICT OF ACQUITTAL FOR POSSESSION OF AMPHETAMINES PRECLUDES PROSECUTION FOR THE OFFENSE OF POSSESSION OF MARIJUANA, WHERE BOTH OFFENSES WERE COMMITTED DURING THE SAME TIME PERIOD?

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IN THE
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NO. 82-1194

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BETTY JEAN LUX DUNN,

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V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent in the two causes herein, by and through its attorney, the Attorney General of Texas, and in response to the petitions for writ of certiorari filed in the above causes, respectfully files this its Brief in Opposition:

OPINIONS BELOW

Copies of the notifications from the Court of Criminal Appeals denying discretionary review are included in the petition for writ of certiorari in No. 82-1039 as Appendix C, and in No. 82-1194 as Appendix B.

JURISDICTIONAL STATEMENT

Petitioner Betty Jean Lux Dunn seeks review by certiorari of the decision of the Texas Court of Appeals for the First Supreme Judicial District, sitting in Houston, affirming the trial court's denial of the requested relief. On October 20, 1982, the petition for discretionary review filed in the Texas Court of Criminal Appeals was denied. A timely filed petition for rehearing was denied by that court on October 25, 1982.

Petitioner Ronald Dale Dunn seeks review by certiorari of the decision by the Texas Court of Appeals for the Fourteenth Supreme Judicial District, sitting in Houston, affirming the trial court's denial of the requested relief. On November 17, 1982, the Texas Court of Criminal Appeals denied the petition for discretionary review.

This Court has jurisdiction of both causes pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V:

> ... nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...

Article 27.05, TEX. CODE CRIM. PROC. (Vernon Supp. 1982):

> A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:
> (1) resulted in acquittal;
> (2) resulted in conviction;
> (3) was improperly terminated; or
> (4) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination in consistent with the fact that must be established to secure conviction in the subsequent prosecution.

STATEMENT OF THE CASE

The facts as to each Petitioner are substantially the same. On January 27, 1979, a search warrant was executed at the home of Ronald Dale and Betty Lux Dunn. As a result of the seizure of amphetamines and marijuana, each Petitioner was indicted for offenses specifically involving the amphetamines, and for possession of marijuana. At the first trial, the state proceeded only on two paragraphs in the indictment relating to the offenses involving amphetamines. The jury was impaneled and sworn, and pleas of not guilty entered by both named defendants. Upon completion of the state's case in chief, both defendants moved for an instructed verdict of acquittal on the ground that the state had failed to meet its burden because the word "amphetamine" was misspelled in the indictment, and therefore failed to allege a violation of the Controlled Substances Act. Upon consideration by the court, the defendants' mo-

tions were granted and the instructed verdict of not guilty were entered for the defendants. Subsequently, the cases were severed. Betty Dunn was tried in August 1980 for possession of marijuana, over her objection that the prosecution was barred by the former acquittal. She was found guilty, given a ten year probated sentence and a fine of $2,500. Under the same circumstances, Ronald Dunn was tried in December of 1981, convicted, sentenced to a ten year probated sentence and fined $5,000. Though the Petitioners have filed under separate cause numbers, the issue presented in the two cases is identical.

REASONS FOR DENYING THE WRITS THE PETITIONS DO NOT PRESENT A QUESTION WORTHY OF REVIEW.

A. Petitioners' trials for possession of marijuana were not barred by the verdict of acquittal in their trial for the amphetamine offenses.

Petitioners argue that their convictions for possession of marijuana must be set aside because all the drug related offenses were part of a single criminal transaction and constitute one offense. Therefore, they argue, since they were acquitted in their first trial, the state was prohibited from prosecuting them for possession of marijuana. Respondent asserts that this interpretation of the law is erroneous.

This Court has established a firm standard for determining when consecutive sentences or successive prosecutions offend the double jeopardy clause:

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two of-

> fenses or only one is whether each provision requires proof of an additional fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304 (1932). It is clear that the *Blockburger* test states current law. Only last term in *Albernaz v. United States*, _____U.S._____, 101 S.Ct. 1137 (1981), this Court reviewed the cases since *Blockburger* which have restated and refined the standard announced there, and applied the *Blockburger* rule to a situation where petitioners had been convicted of conspiracy to import marijuana and conspiracy to distribute marijuana and received consecutive sentences.

The rule in *Blockburger* expresses the purpose of the double jeopardy clause to impose limits on judges and prosecutors. The power to define crimes and impose punishments upon those who are found guilty of them, however, resides wholly with the legislative branch. Thus, if the criminal statute meets the *Blockburger* test, and the sentences imposed for each violation are not in excess of the statutory penalties for violation, no Fifth Amendment question is presented. In this case, it is clear that, to establish a violation involving marijuana and a violation involving amphetamines, the prosecution must prove, in each case, a fact that is not necessary to the other, *i.e.*, the presence of the two drugs. Nor is one offense a lesser included offense of the other. *See, Brown v. Ohio*, 432 U.S. 161 (1977). Moreover, the language of the act tends to the conclusion that the legislature intended for each to be a separate offense. The relevant penalty provisions in the Texas Controlled Substances Act provide as follows:

> §4.032(a)
>
> Except as authorized by this Act, a person commits an offense if he knowingly or intentionally

> manufactures, delivers, or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 3 or 4.
>
> §4.051(a)
>
> Except as authorized by this Act, a person commits an offense if he knowingly or intentionally possesses a usable quantity of marijuana.

Article 4476-15, TEX. CIV. STAT. ANN. (Vernon Supp. 1982). In construing a similar federal statute, the Fifth Circuit found that the use of the language "a controlled substance" was intended to provide flexibility in sentencing and to allow the judge to tailor the penalty to fit the seriousness of the offenses.

> We therefore find that the purpose of the Act is to provide for multiple sentencing for simultaneous possession of different types of drugs. When Congress set penalties for possession of "a controlled substance," it intended to permit trial courts to penalize possession of "each" controlled substance.

United States v. Davis, 656 F.2d 153 (5th Cir. 1981). Thus, under any of the various tests, the criminal offenses involving amphetamines, and the offense of possession of marijuana must be construed to be two separate crimes. Therefore, prosecution for both could not have violated the Fifth Amendment, and the trial court did not err in overruling Petitioners' pleas in bar.

The *Blockburger* analysis disposes of the issue in these petitions. It is also worth noting, however, that the state apparently could have re-indicted and retried Petitioners even on the amphetamine charges. The original indictments referred to the controlled substance as *amphetimine*, clearly a clerical error. The trial judge,

therefore, on defendants' motion, directed a verdict of acquittal. As this Court has acknowledged, however, not every action by a trial judge termed an "acquittal" operates as a bar to re-prosecution. For purposes of the Fifth Amendment, further prosecution is barred only if "... the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). *See also* Petition for Writ of Certiorari, No, 82-1039, at 7a; *Thompson v. State*, 527 S.W.2d 888 (Tex.Crim.App. 1975).[1] Here, the situation is akin to a granting of defendants' motion for mistrial; in the absence of prosecutorial or judicial overreaching, defendants' motion ordinarily removes any bar to reprosecution. *United States v. Jorn*, 400 U.S. 470, 485 quoted in *United States v. Dinitz*, 424 U.S. 600 (1976).

B. The state court's alleged failure to follow state procedural rules does not raise a federal question.

Petitioners make much of what they argue was a failure of their respective trial judges to abide by Article 27.05, Texas Code of Criminal Procedure. Article 27.05, quoted in full, *supra*, sets out the various jeopardy pleas, which must be raised by the defendant prior to the trial. This statute, however, is not a statement of substantive law. It is merely a procedural statute setting out one of the steps a defendant must take to protect his rights during trial. The state has not suggested that Petitioners failed to assert their double jeopardy claims in a timely manner; therefore, the statute is not relevant here. Moreover, there is some discussion to the

1. Since the first trial did not establish any of the factual elements of the two offenses, the state was not collaterally estopped from trying any of the elements in the subsequent trials. See, *Ashe v. Swenson*, 397 U.S. 436 (1970).

effect that Article 27.05 applies only to crimes against property. See, 12 Texas Tech L. R. 393, 420-421 (1981).

Petitioners also correctly point out that, prior to 1982, a defendant in Texas could not be prosecuted and sentenced for possession of two different drugs at the same time. *Ex parte Adams*, 541 S.W.2d 440 (Tex.Crim.App. 1976). This rule arose from the Texas "carving doctrine" which was a rule of fairness imposed by the state courts to prevent prosecutors from parsing a single crime into as many crimes as possible for purposes of harassing the defendant. That doctrine was abolished in *Ex parte McWilliams*, 634 S.W.2d 815 (May 12, 1982)(on rehearing). In that case, the petitioner was convicted of the offenses of aggravated kidnapping, aggravated robbery, and aggravated rape, all committed in the same criminal episode or transaction. Both the majority and the dissenters agreed that the doctrine of carving was not based on the federal or state constitution.

> The doctrine of carving was court made; constitutions and statutes make no provisions for such a doctrine. Since we are abandoning the carving doctrine, we will now decide double jeopardy questions under the strict construction of the Constitutions of the United States and of this State.

Id. at 824. The court went on to analyze the case under the *Blockburger* rule. In any case, since the carving doctrine was apparently a creature of this jurisdiction only, the trial court's failure to follow the state caselaw cannot form a basis for invoking this Court's certiorari jurisdiction. Since Petitioners' prosecutions for possession of marijuana do not implicate the double jeopardy clause, the petitions for writ of certiorari should be denied.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the Petitions for Writs of Certiorari in Numbers 82-1039 and 82-1194 be denied.

Respectfully submitted,

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